IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3893 OF 2005

In

SUIT NO.3291 OF 2005

Chandrakant Govind Bagwe : Plaintiff

V/s.

Vandana Krishnarao Raut & Ors. : Defendants

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WITH

NOTICE OF MOTION NO.329 OF 2006

In

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SUIT NO.3291 OF 2005

Chandrakant Govind Bagwe : Plaintiff

V/s.

Vandana Krishnarao Raut & Ors. : Defendants

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Mr.R.S.Apte with Ms A.N. Helekar for the plaintiff.

Mr.S. Purohit with Mr.K.A. Chhotani i/b. Lalitkumar Jain & Co., for the defendants.

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CORAM : S.U. KAMDAR, J.

DATE : February 15, 2006.

ORAL ORDER:

1. Notice of Motion No.329 of 2006 has been taken out for vacating the ad-interim order passed on 19.11.2005 in Notice of Motion No.3893 of 2005.

2. In the light of the facts, granting of Notice of Motion No.329 of 2006 would finally determine Notice of Motion No.3893 of 2005. By consent of the parties, I have heard both the Motions finally.

3. Some of the material facts in the present case are as under:-

The suit is filed by the plaintiff for specific performance of an agreement of sale and/or development right dated 5.5.1990. In respect of the said suit, it is the case of the plaintiff that the plaintiff has complied with his obligations and is, therefore, entitled to specific performance of the said agreement. The agreement, inter alia, confers development rights on the plaintiff herein on the various terms and conditions mentioned therein. The consideration payable under the agreement was Rs.3,50,000/- and the same was payable in instalments as mentioned in clause 5 of the said agreement. It is the case of the plaintiff that under

clause 10 of the said agreement, the plaintiff was put in possession of the suit property whereas it is the case of the defendants that the plaintiff was never put in possession. The learned counsel for the plaintiff has also relied upon an undated letter which, inter alia, states that the defendants are in possession as a licensee in respect thereof till the execution of the conveyance. It is the case of the plaintiff that a suit was filed on 25.5.1990 in the City Civil Court at Mumbai, being Suit No.3573 of 1990. The said suit was filed by a third party both against the plaintiff and the defendants. It is further case of the plaintiff that the said suit was prosecuted till 2004 and only in 2004, by an order passed by His Honour Judge Shri N.P.Dalvi that the said suit came to be dismissed on 7.9.2004 under Order XV Rule 4 of the C.P.C.

4. It has been further averred in the plaint that after dismissal of the suit on 7.9.2004, the plaintiff called upon the defendants to transfer the said property and execute the Deed of Conveyance of the suit property in their favour and also offered to pay the balance of consideration amount.

5. It is his further case that in spite of sending the said letter, the defendants did not take any action, but the defendants through their Advocate’s letter dated

8.2.2005 disputed the said agreement and contended that the same is not binding upon them because the plaintiff has failed to pay consideration amount when it became due and that they have already revoked the Power of Attorney given to the plaintiff. The plaintiff, therefore, once again put the correct facts on record and also sent them a cheque, through his Advocate's letter dated 23.2.2005 calling upon the defendants to execute the said conveyance. It is the case of the plaintiff that on 30.3.2005 the defendants returned the cheque and, accordingly, the plaintiff has filed the suit for specific performance as the plaintiff was ready and willing to perform his part of the agreement. He has in para 17 pleaded that on 11.11.2005 at about 8.30 p.m., he received a call from his watchman that some people were trying to dispossess him from the suit property. Therefore, he sent his persons to the site and again on 12.11.2005 the same persons along with antisocial elements alleged to have authority from the defendants sought to enter upon the property and put paint on the board of the plaintiff. In view of the aforesaid position, the plaintiff has lodged a complaint with Samata Nagar police station, Kandivli (West), Mumbai, and proceedings were started. On the aforesaid averments, the plaintiff has filed the present suit for specific performance and took out a Notice of Motion praying for interim relief. It is the case of the plaintiff that the Notice of Motion was duly served and

affidavit of service was filed on 19.11.2005 stating that though the proceedings were sought to be served on the defendants at the address mentioned in the cause title on 18.11.2005 at 7.30 p.m., the person present at the said address, who identified himself as the servant, refused to accept the service. He has further stated that on the next day also service was sought to be effected. However, the same person who was present there refused to accept service. On the aforesaid averments, an application was made for ad-interim orders on 19.11.2005 and ad-interim order was obtained in terms of prayer clause (a) of the Notice of Motion. The said prayer clause (a) of the Notice of Motion is, inter alia, for an injunction restraining the defendants and/or antisocial elements on their behalf from creating third-party rights and interest in respect of the suit property, viz., survey No.68, hissa No.2, of village Poisar, taluka Borivli, Mumbai, admeasuring about one acre seven gunthas or thereabouts.

6. It is this ad-interim order which is sought to be vacated by Notice of Motion No.329 of 2006. In the affidavit-in-support of the Notice of Motion for vacating the ad-interim order, the defendants have contended, firstly, that there is a serious suppression of material facts. In fact, the development agreement dated 5.5.1990 was terminated by notice dated 25.1.2002 by the defendants and the said notice has been duly served and, in fact,

replied to by the plaintiff through his Advocate's letter dated 16.2.2002. The said letters are annexed at exh.'B' and 'D' to the affidavit-in-support of the Notice of Motion. There is also a public notice which has been annexed which is dated 31.1.2002, inter alia, pointing out that by letter dated 25.1.2002, the rights of the plaintiff in the development agreement have been terminated and the Power of Attorney was also terminated.

7. Both these letters dated 25.1.2002 as well as 16.2.2002 are neither referred to nor averments in respect thereof have been set out in the plaint. These two letters are not even annexed to the plaint. However, the learned counsel appearing for the plaintiff has drawn my attention to para 14 on page 7 of the plaint in which two letters dated 28.12.2004 and 8.2.2005 are referred to. He states that these two letters dated 28.12.2004 and 8.2.2005 are annexed as exh.'H' and 'I' to the plaint. It is his case that by virtue of the fact that in the contents of the said letter dated 8.2.2005 in para 2, the notice of 25.1.2002 is referred to and in letter dated 23.2.2005 in para 7, the reply letter dated 16.2.2002 has been referred, there is no suppression of material facts in respect of the termination letters dated 25.1.2002 and 16.2.2002. He has further contended that by virtue of para 2 of the said letter dated 8.2.2005, in fact there is a disclosure that the power of attorney and the agreement

were terminated on 25.1.2002. It is his further case that by virtue of the averments in para 14 on page 7 of the plaint, there is sufficient averment disclosing that on 25.1.2002, the said agreement and power of attorney were terminated by the defendants. The averments on which reliance is placed by the plaintiff reads as under:-

> "The Plaintiff states that after a period of two months the Defendants have through their advocate's reply dated 8th February 2005 to the said notice, inter alia, recorded that the said agreement is not binding upon them and the Plaintiff has not paid any consideration and they have revoked the powers."

He has, therefore, contended that, in fact, there is no material suppression in respect of both the letters dated 25.1.2002 and 16.2.2002. He has further contended that, in any event, the said letters are irrelevant because even thereafter he has been permitted by the defendants to prosecute the suit on their behalf and by virtue of permitting him to prosecute Suit No.3573 1990 which was pending in the City Civil Court at Mumbai between 2002 and 2004, the defendants have given up the said termination of the agreement and, therefore, the contentions raised by the defendants are without any

merits and the ad-interim order should be confirmed. On merits, he has contended that the suit is within time, though there is a termination of the agreement on 25.1.2002 and the suit was lodged on 17.11.2005. It is contended that in fact, he was prosecuting Suit No.3573 of 1990 and, therefore, the termination dated 25.1.2002 should be ignored. In any event, if period of 2002 to 2004 is taken into consideration when he was prosecuting the said suit, then the suit is within limitation under Article 54 of the Limitation Act, 1963.

8. It has been further contended by the learned counsel for the plaintiff that the plaintiff will be entitled to specific performance of the suit agreement because the plaintiff has complied with his part of the obligation thereunder.

9. I have considered the arguments of both the learned counsel and I am of the opinion that the Notice of Motion initiated by the plaintiff is liable to be dismissed. It is because in a suit for specific performance, termination of an agreement is the most vital fact and a party who is seeking specific performance of an agreement must disclose if there was a termination of the agreement by the other party. It cannot be stated that termination of the agreement must be referred to by virtue of statement made in a subsequent letter and that itself is

sufficient disclosure of the material fact. In the present suit, there is no averment in the plaint that in fact there was termination of the agreement by letter dated 25.1.2002 though it was replied to by the plaintiff by his Advocate's letter dated 16.2.2002. There is no averment or mention of the said termination of the agreement in the entire plaint. Those two letters are not even annexed to the plaint and thus, in my opinion, there is a serious suppression of the material facts by the plaintiff in the present suit.

10. Now, turning to the contention of the learned counsel for the plaintiff that by virtue of the averments in para 14, there is a disclosure of termination of the agreement or revocation of the power of attorney on 25.1.2002, in my opinion, it is not so, firstly, because a reading of paras 12, 13 and 14 in its entirety indicates that the plaintiff came to the Court with the case that there was no dispute between the parties right upto 2004 and the disputes arose only after dismissal of the suit on 7.9.2004. In para 14 of the plaint, it is his case that after the dismissal of the suit by the City Civil Court on 7.9.2004, he called upon the defendants to complete the transaction and because the defendants refused to conclude the transaction, he has filed the suit for specific performance. In fact, the averments made in para 14 of the plaint comprise the most vital and

material facts and in which there is no mention of the termination of the agreement by letter dated 25.1.2002. But on the contrary, it misleads and misrepresents the Court that there was no dispute prior to notice dated 28.12.2004 which was forwarded by the plaintiff to the defendants before completion of the agreement. Furthermore, the averments in para 17 of the plaint also lead to the conclusion that the cause of action for filing the suit arose on 11.11.2005 when he was said to be dispossessed. In any case, in the plaint, as it proceeds, not only there is material suppression of facts but also contains total misrepresentation of facts by leading the Court to believe that there was no termination of the agreement till 25.1.2002 and the cause of action has arisen only in 2004. I am also of the opinion that the mere reference of the earlier correspondence in a subsequent letter by itself does not mean that there is material disclosure of facts as required and necessary in a plaint by a party who seeks orders from this Court. A reference to a letter in another letter is permissible only when such another letter is not so significant and vital to the facts of the case. In the present case, there is suppression of the termination letter dated 25.1.2002. The person who files the suit for specific performance must disclose that there was a termination of the agreement since the relief sought is based on the validity of termination of

the agreement which is vital information. In the present case, there is no reference to any such termination letter in the entire plaint.

11. I am also fortified in my aforesaid view by the fact that in fact the learned Judge while passing the order on 19.11.2005 was also led to believe that the dispute arose recently and there was no dispute between the parties till 2004. In the light of the aforesaid facts, I find that the plaintiff has come to this Court with unclean hands as there is serious suppression of relevant and material documents. I also find from the averments in paras 12, 13 and 14 that there is not only suppression of material facts, but there is a deliberate attempt by the plaintiff to mislead this Court for obtaining the orders which otherwise could not have been passed but for the false representation made in paras 12, 13 and 14 indicating that the dispute between the parties arose only after dismissal of the suit on 7.9.2004. In my opinion, on the aforesaid ground itself, the Notice of Motion initiated by the plaintiff is liable to be dismissed.

12. Even otherwise on merits, I am of the view that there is a termination of the agreement on 25.1.2002 and admittedly the suit is filed on 17.11.2005 in this Court. The period of limitation of three years as provided vide

Article 54 has expired on 25.1.2005 itself and thus the suit is ex facie barred by the law of limitation. However, the learned counsel for the plaintiff has contended that by virtue of the fact that the plaintiff was allowed to prosecute the suit between 2002 and 2004, being Suit No.3573 of 1990 in the City Civil Court, the defendants are deemed to have waived the termination and, therefore, the question of the suit being barred by the law of limitation does not arise. In support of the aforesaid, except the averments in the plaint that the plaintiff was prosecuting the suit till 2004, he has not produced any material document or evidence to indicate that after 25.1.2002, he prosecuted the suit actively and that also with the knowledge and consent of the defendants herein. There is not even an averment in the plaint by the plaintiff that by virtue of his prosecuting the suit, the termination of agreement dated 25.1.2002 should be treated as waived off. He has on the contrary not even disclosed the fact of the said termination at all. In the light of the aforesaid facts, it would not be possible to accept the contention of the learned counsel for the plaintiff that the suit is not barred by limitation.

13. In the aforesaid facts, I am of view that Notice of Motion No.3893 of 2005 is liable to be dismissed. The Motion is accordingly dismissed. Notice of Motion No.329

of 2006 does not survive any further in view of the dismissal of Notice of Motion No.3893 of 2005 and the said Notice of Motion No.329 of 2006 stands disposed of.

14. In the light of the view I have taken that there is material suppression of the facts in these proceedings by the plaintiff, it is but natural that I must further proceed to initiate action against the plaintiff for suppression of the material facts. Accordingly, the office to issue show cause notice under section 12(2) of the Contempt of Courts Act, 1971 read with Article 215 of the Constitution of India calling upon the plaintiff to explain as to why action for contempt be not initiated against him for suppression of material facts and for misleading the Court vide paras 12, 13 and 14 of the plaint. The show cause notice is made returnable on 6.3.2006. Motion is disposed of accordingly. The plaintiff to pay costs of the Motion to the defendants quantified at Rs.10,000/-.

15. In spite of the aforesaid position, the learned counsel for the plaintiff has vehemently contended that the ad-interim order should be continued for a period of eight weeks. In the light of the view which I have taken, the request is totally unreasonable. The application is rejected.

S.U. KAMDAR, J.